

a claim for defamation. The article complained of appeared in the issue of the Chinese paper *Feng Pao* dated 27th March 1953, and is entitled "Midwife met ghost—Notes turned into Hades currency". The article described how the appellant, a midwife, was taken to a big house at night where she delivered a male child. When she had completed her work she was paid \$200. On leaving the house she turned round to look at it and found the house had disappeared and that she was in a cemetery. She hurried to the main road in a state of great fright, and on arriving at her house found that the \$200 in notes had turned into a heap of ashes of burnt Hades currency. So great was her fright that she had been in bed ill ever since.

The learned trial Judge dismissed the claim on the ground that in the eyes of the average thinking man the article did not tend to lower the reputation of the plaintiff or disparage her in the way of her profession and was not therefore defamatory.

The test of what constitutes a libel is summarised as follows in *Gatley on Libel and Slander*, 3rd edition (at page 14):—

"Any written or printed words which tend to lower a person in the estimation of right-thinking men, or cause him to be shunned or avoided, or expose him to hatred, contempt or ridicule, constitute a libel.

Scandalous matter is not essential to make a libel. It is enough if the words render the plaintiff contemptible or ridiculous, or tend to degrade or lower him in the estimation of men, whose standard of opinion the Court can properly recognise, or to hinder mankind from association or having intercourse with him."

In my view the article, however viewed, is defamatory of the appellant. The opinion of those who believe in ghosts we can discount and not apply a seventeenth century English standard, but the opinion of all other persons must be that here is a silly woman who believes in ghosts to such an extent that she makes herself ill and is unable to pursue her profession as a midwife. A false statement has been made about the appellant to her discredit and she has been ridiculed and brought into contempt. The appellant is therefore entitled to succeed in her claim. No useful purpose can be served in referring the case back for consideration of the damages to be awarded, and as this Court has power to dispose of the matter, I would award \$500 damages.

I would accordingly allow the appeal with costs here and in the Court below and order that judgment be entered for the appellant in the sum of \$500. The deposit in Court will be returned to the appellant.

Murray-Aynsley C.J. (S.):—I agree with the judgment of the Chief Justice of the Federation of Malaya.

I think that the passage cited from *Gatley* correctly sets out the law and is in accordance with common sense.

Certain authorities tend to restrict the scope of defamation by imposing the test of the effect on a hypothetical "average reasonable man". Farwell J. in *Leetham v. Rank*⁽¹⁾, said it was not enough to prove that the words rendered the plaintiff obnoxious to a limited class; it should be proved that the words produced a bad impression on the minds of average, reasonable men.

The average man does not exist in nature. "Average" is only a mathematical concept and does not correspond with any particular instance. The expression "reasonable man" merely means people who agree with one. At the present time such a diversity of opinion exists on all fundamental questions that it is impossible to select any one point of view and treat it as that of the reasonable man. One must consider the "milieu" of the plaintiff in any particular case and consider the outlook of law-abiding persons in that milieu. For instance, it would be clearly a libel to announce that a Catholic priest had married, whether the majority of the people set any store on clerical celibacy or not. Equally to say of a Unionist member of parliament for Northern Ireland that he had gone on a pilgrimage to Lourdes. I think the only *criterion* that the Courts can adopt is that of the law-abiding citizen. Legality is the only standard which Courts can recognize.

I agree with the proposed order.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Battenberg & Talma.*

ZAINAB BINTI ISMAIL v. MARIMUTHU & ANOR.

[O. C. J. (Hill J.) January 13, 1955]

[Alor Star—Civil Appeal No. 191 of 1953]

Damages—Shock—Mother seeing daughter killed by lorry—Courts Ordinance, 1948—Action for loss of expectation of life.

The 1st defendant, a lorry driver, drove a lorry belonging to the 2nd defendant along a quiet and somewhat infrequented side street at a speed and recklessly and noisily. As a result of his negligent driving, which was proved, the plaintiff's daughter was killed while washing clothes at a stand pipe in the side street. The evidence showed that the plaintiff actually saw the accident, as a result of which she suffered from shock and was still sick nearly two years after the accident. The plaintiff, *inter alia*, claimed damages for shock and illness, and for loss of expectation of life of

the deceased arising out of the negligence of the 1st defendant.

Held: (1) the 1st defendant could not be exempted from liability for shock to the plaintiff on the ground of remoteness. On the evidence of the Doctor she was, therefore, entitled to damages of \$5,000; (2) as there was no provision in the Courts Ordinance, 1948, for an action for loss of expectation of life the plaintiff's claim under this heading failed.

Cases referred to:—

- (1) *King v. Phillips* (1953) 1 Q.B. 429; (1953) 2 W.L.R. 526; (1953) 1 All E.R. 617; (1953) C.L.Y. 964.
- (2) *Bourhill v. Young* (1943) A.C. 92.
- (3) *Owens v. Liverpool Corpn.* (1939) 1 K.B. 394.
- (4) *Hambrook v. Stokes Bros.* (1925) 1 K.B. 141.
- (5) *V. Karupanan v. Empire Theatre* (1941) M.L.J. 96.

CLAIM for damages.

I. K. Meek for the plaintiff.

Ng Jit Geow for the defendants.

Cur. Adv. Vult.

Hill J.:—On the afternoon of the 21st March, 1953, the plaintiff's daughter, Niamteh, was killed while washing clothes at the stand pipe in Lorong Merpati by a lorry belonging to the 2nd defendant and driven by the 1st defendant.

Two questions of fact arise in so far as this case is concerned. (1) Did the 1st defendant drive the lorry negligently and (2) was the accident seen by the plaintiff. In my opinion the answer to both these questions is yes.

With regard to the first question, the evidence is so clear of the 1st defendant's reckless and probably drunken driving that I shall waste no time in referring to it.

As to the second question, I believe the plaintiff and there were witnesses who saw her near the scene of the accident. There were apparent discrepancies in the evidence of some of the plaintiff's witnesses, but they were in my view only the kind to be expected when witnesses from different positions, distances and angles are giving their impressions of a sudden and unexpected event and whose attention would naturally be concentrated on the actual scene of the accident itself.

I therefore find as a fact that the plaintiff was on the roadside and actually saw her daughter killed by the lorry.

The plaintiff has claimed damages under four heads in accordance with the amended particulars to the claim. I will deal with each in turn.

- (I) Loss to the plaintiff of support and services from the deceased \$8,000.00

I saw no reason whatever for not accepting the plaintiff's evidence regarding the assistance her deceased daughter was to her in her business and I am satisfied that the child's death has resulted in financial loss. The plaintiff gave figures from which, however, I can only come to a somewhat arbitrary figure. Mr. Meek suggested \$30 a month for ten years. I think the amount is fair, but I do not consider that a longer period than six years should be allowed. The sum therefore that I award under this head is \$2,160.

- (II) Nervous shock and illness of the plaintiff arising out of the negligence of the 1st defendant \$8,000.00

I think it is worth repeating here a part of §964 from the *Current Law Year Book*, 1953, which reads as follows:—

"Shock — mother seeing accident to child. The test of liability for shock is foreseeability of injury by shock. But this test is by no means easy to apply. The test is not what the negligent party himself could reasonably have foreseen, for he rarely has time to foresee anything. The test is what a hypothetical reasonable observer could reasonably have foreseen. It is difficult to decide where the line is to be drawn. As Lord Wright observed in *Bourhill v. Young*, *infra*, the line is to be drawn only where "in the particular case the good sense of the judge decides."

Per Denning L.J.: "The true principle, as I see it, is this: Every driver can and should foresee that, if he drives negligently, he may injure somebody in the vicinity in some way or other; and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered. If he does by his negligence in fact cause injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness."

Per Singleton L.J.: "I find it difficult to draw a distinction between damage from physical injury and damage from shock; *prima facie*, one would think that, if a driver should reasonably have foreseen either, and damage resulted from the one or from the other, the plaintiff would be entitled to succeed."

I have also considered the following cases:—*King v. Phillips*⁽¹⁾ following *Bourhill v. Young*⁽²⁾ distinguishing *Owens v. Liverpool Corporation*⁽³⁾ and *Hambrook v. Stokes Bros.*⁽⁴⁾.

I have therefore to decide this issue by my "good sense". Here we have a lorry driven at speed and recklessly, and I have no doubt noisily, into a side street or lorong. The very manner of its driving along a quiet and somewhat infrequented lorong is likely to cause the residents along this road to look out and in doing so see any accident that might occur. Applying therefore the test of what a hypothetical reasonable observer could reasonably have foreseen to my finding of the facts of this case, I come to the

conclusion that the 1st defendant cannot be exempted from liability for shock to the plaintiff on the ground of remoteness. The plaintiff is therefore entitled to recover damages under this head. In trying to arrive at a figure little assistance is gained from considering recent English awards which range from £75 to £2,300. The Doctor's evidence showed that plaintiff is genuinely suffering from shock and she appeared to me to be still a sick woman nearly two years after the accident. I consider she is entitled to a substantial part of the amount she claims and I award the sum of \$5,000.

(III). Loss of expectation of life of the deceased.
\$4,000.00.

Counsel for the 2nd defendant submitted that no such cause of action lies in Kedah as the relief is purely statutory. He argued that the ruling in *V. Karupanan v. The Empire Theatre*⁽⁵⁾ no longer applied as the 1948 Courts Ordinance now in force contains no power as provided in section 11 of the old Kedah Courts Ordinance and that Kedah Enactment No. 2 of 1960 does not specifically provide for an action for loss of expectation of life.

It was probably never intended that the citizens of this State should be deprived of this right, but it seems to be the case that there is no statutory provision existing at the present time and that the change in the law above referred to extinguished the right to sue in Kedah for loss of expectation of life. In my view therefore the submission on behalf of the 2nd defendant is correct and the plaintiff is not entitled to recover under this head.

(IV). Funeral and incidental expenses arising out of the death of the deceased and incurred by the Plaintiff, \$350.00.

This amount was not disputed and the plaintiff is entitled to recover \$350.

There will therefore be judgment for the plaintiff for the amounts set out above, totalling \$7,350 and costs.

Judgment for the plaintiff.

Solicitors : *Presgrave & Matthews; Conaghan, Wreford & Thornton.*

TUKIRAN BIN TAIB v. PUBLIC PROSECUTOR

[R. Cr. J. (Bellamy J.) January 14, 1955]

[K.L.—Criminal Revision No. 40 of 1954]

Criminal Procedure—Young offender—Plea of guilty—Practice—Duty of Magistrate.

It is very desirable that a young first offender who is between the ages of 17 and 21 should be kept out of prison, if possible; it would be more beneficial to him, and in the long run to the community at large, to send him to an advanced approved school.

It is the duty of a trial Judge before passing sentence to record some evidence in a criminal case where the accused pleads guilty. In cases of doubt or difficulty it may be advisable to have evidence led as to the facts. Magistrates should make careful inquiries "regarding the background, antecedents and character" of the convicted person, and this is particularly of importance when the convicted person is a young offender and it is contemplated imposing a sentence of imprisonment. A probation officer's report should always be called for, and a Magistrate should not hesitate to adjourn the case in order to obtain such a report before passing sentence.

Cases referred to:—

- (1) *Palan v. Public Prosecutor* (1932) M.L.J. 124.
- (2) *Public Prosecutor v. Nahat Singh* (1939) M.L.J. 239.
- (3) *Public Prosecutor v. Chean Tin* (1939) M.L.J. 266.
- (4) *Chin Ban Keat v. Rex* (1949) M.L.J. 297.
- (5) *Abu Bakar bin Alif v. R.* (1953) M.L.J. 19.
- (6) *Ong Ah Thoo v. Rex* (1949) M.L.J. 36.

CRIMINAL REVISION.

Cur. Adv. Vult.

Bellamy J.:—In this case Tukiran bin Taib was charged in the Magistrate's Court at Tanjong Karang with the theft of 167 coconuts under Section 379 of the Penal Code. He pleaded guilty and was sentenced to four months' imprisonment. As the accused is 17 or 18 years old, I called for the record of the proceedings to satisfy myself as to the propriety of the prison sentence imposed by the Magistrate.

The facts, which I am assured by the Deputy Public Prosecutor were admitted in Court by the accused, briefly were these. On 1st December, 1954 about 3 p.m. a watchman patrolling Banjor Estate, a coconut plantation at Kampong Batu Lima, caught the accused red-handed on the estate unhusking coconuts which he had recently plucked by means of a bamboo pole from two lines of twelve coconut trees on the estate. When asked for an explanation, the accused glibly stated that he was merely working for a Chinese who had purchased the coconuts in question from the clerk in charge of the estate. So saying, he put the coconuts he had already unhusked into a sack and sauntered off into a neighbouring plantation. The watchman then made enquiries concerning what the accused had told him, and it was then discovered his story was false and that in fact the accused had plucked, and removed, the coconuts without the consent of the owner of the estate or the clerk in charge thereof. The theft was reported to the police who arrested the accused on the following day. In mitigation, the accused told the Magistrate that he had "no 'wang' (money) for expenses."